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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORRIN BACOTE,

Plaintiff,

v.

16 CV 1599 (GHW)
Telephone Conference

RIVERBAY CORPORATION, ET AL.,

Defendants.

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New York, N.Y.
January 5, 2017
4:05 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES VIA TELEPHONE

COHEN & FITCH, LLP
Attorneys for Plaintiff
BY: GERALD M. COHEN
ILYSSA S. FUCHS

ARMIENTI, DeBELLIS, GUGLIELMO & RHODEN, LLP
Attorneys for Defendants
BY: HORACE RHODEN
VANESSA CORCHIA

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(In chambers; telephone conference)

THE COURT: This is Judge Woods. Do I have counsel for plaintiff on the line?

MR. COHEN: Yes, Gerald Cohen here, with Ilyssa Fuchs.

THE COURT: Thank you. And do I have counsel for defendants on the line?

MR. RHODEN: Horace Rhoden with Vanessa Corchia.

THE COURT: Thank you. Good afternoon. I scheduled this conference in response to the request by counsel for defendants for a pre-motion conference with respect to a potential of what I construe to be a rule 56 motion.

I've reviewed the letter dated December 23rd submitted by defendants and also the responsive letter submitted by plaintiff. I'd like to hear from each of you in turn.

First, I'd like to hear from counsel for defendants regarding the proposed bases for your motion for summary judgment. Your letter was not precise as to the nature of the motion in terms of the claims that you'll be seeking to dismiss as against which defendants and the basis for your contention that there is no disputed issue of material fact with respect to the relevant arguments. So I'd like to give you the opportunity to focus your presentation on those issues now. Then I will hear from counsel for plaintiff.

All of this in anticipation of setting a briefing schedule for any potential motion. Let me hear first from

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1 counsel for defendants. What's the proposed basis for your
2 motion?

3 MS. CORCHIA: Good afternoon, your Honor. This is
4 Vanessa Corchia. I just wanted to bring you up to date first
5 that earlier today, Mr. Rhoden and plaintiff's counsel had a
6 discussion about narrowing the causes of action at issue
7 originally in the complaint, taking into account the number of
8 defendants and the number of different causes of action, there
9 were 82 claims. At this point, there's been an agreement that
10 there will be a voluntary discontinuance or withdrawal of 28 of
11 those claims.

12 The first item I'd like to address as to causes of
13 action that we believe are viable in having dismissed --

14 THE COURT: I'm sorry, can I ask you to come back to
15 your prior comment?

16 MS. CORCHIA: Yes, your Honor.

17 THE COURT: What are the prior claims you expect to be
18 dismissed?

19 MS. CORCHIA: One second, your Honor. I do have a
20 list. Your Honor, okay, the false arrest claim will be
21 dismissed against Riverbay, the unlawful search and seizure
22 claim will be dismissed as to Codero, Ifill, Rivera, Lambert,
23 Marsonico, Mendoza, Leath and Riverbay Corporation.

24 The right to a fair trial claim will be dismissed as
25 against Officers Ifill, Lambert, Leath, Rivera and Riverbay

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1 Corporation.

2 The malicious prosecution claim, the federal-based
3 claim, will be dismissed as to Officers Ifill, Lambert, Leath,
4 Rivera and Riverbay Corporation.

5 The malicious prosecution claim, which is the State
6 claim will be dismissed as to Police Officer Ifill, Lambert,
7 Leath and Rivera.

8 The excessive force claim will be dismissed as to
9 Mendoza and Riverbay Corporation.

10 The corporate liability claim with regard to Riverbay
11 Corporation will be dismissed in its entirety, and the
12 negligence hiring claims against Riverbay Corporation will be
13 dismissed in its entirety.

14 THE COURT: Good. Thank you. Please proceed.

15 MS. CORCHIA: Okay. Now, your Honor, one of the
16 issues that we would like to move on with regard to our
17 proposed summary judgment has to do with the false arrest
18 causes of action. We would like to move for dismissal as to
19 all police officers with the exception of Catala and Gregory.

20 Our theory, your Honor, is that, yes, there are
21 disputed facts as to the initial interaction between Mr. Bacote
22 and the first two officers that arrived, which are Catala and
23 Gregory. So we know there's a dispute as to that interaction,
24 who started what, who placed their hands on who.

25 Okay, so acknowledging that there's a factual dispute,

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1 what's not in dispute is later on -- well, I should add one
2 more fact, your Honor. At some point with this initial
3 contact, Catala winds up injured with a broken leg,
4 incapacitated. A call is made that there's a fight in
5 progress. Other officers arrive.

6 From their perspective, your Honor, what they are
7 seeing is they see an officer down. Catala's leg is visibly
8 broken. It's an actual visible injury. His foot is twisted in
9 the opposite direction. They see officers arriving, see some
10 type of fracas going on in front of them. They see civilian
11 officers, and at that point, their state of knowledge is
12 they're responding to a fight in progress; so they have
13 probable cause for any part of the arrest that takes place.

14 So that, by way of an example, a probable cause would
15 be a defense to a false arrest claim. So even though there's
16 really one arresting officer, according to the paperwork, which
17 is Codero, we believe that the officers that come after the
18 fact, after the initial interaction between Mr. Bacote and
19 Catala and Gregory, we believe we have a viable dismissal
20 motion on the false arrest cause of action, your Honor.

21 THE COURT: Thank you. Proceed.

22 MS. CORCHIA: Okay. Also, similarly with regard to
23 the malicious prosecution claim, we believe that there's no
24 probable cause -- I'm sorry, one second, your Honor. I'm
25 sorry, your Honor, yes. For the same reason, because lack of

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1 probable cause is a defense with regard to that claim. For the
2 same reasoning, we believe the same officers have a viable
3 claim.

4 Additionally, with regard to malicious prosecution,
5 there has to be a showing of actual malice as a motivation, and
6 we believe that that's a different element that can't be
7 satisfied as to the officers that arrived later.

8 Your Honor, with regard to the -- Okay. Your Honor,
9 there's one other point with regard to the malicious
10 prosecution that involves a requirement that evidence be
11 fabricated, and we don't believe that there's any such instance
12 of that in this case.

13 With regard to a denial of a right to a fair trial,
14 your Honor, that requires fabrication of evidence of a material
15 nature. In this particular case, there are three reports that
16 potentially could be pointed at as being the, quote, fabricated
17 evidence. One of the reports is actually prepared by the
18 New York City Police Department, another of these reports is a
19 Riverbay Corporation report. However, that report is issued
20 actually after the -- five days after the arrest; so it could
21 not have impacted the arrest because it's after the fact.

22 The final report does contain as the arresting
23 officer, Officer Codero, but we believe that the other
24 individuals can't be held for denial of a right to a fair
25 trial. As to Codero, we actually have an alternative argument

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1 with regard to Officer Codero.

2 The report -- in the report he says that he received
3 some information with regard to Officer Gregory -- from Officer
4 Gregory and that he was told that Officer Gregory -- I'm sorry,
5 that Mr. Bacote pushed Officer Gregory or grabbed him and threw
6 him to the ground. Now, even assuming that that's what he was
7 told, that would have been hearsay and could not have been
8 utilized with regard to a trial because it's pure hearsay of
9 what someone told him, and it also cannot be considered to be
10 fabricated because he said that's what he believed he was told.

11 Fabrication implies an intent to give false
12 information; so, therefore, that's why we believe, in addition,
13 Officer Cordero has a viable dismissal claim with regard to the
14 denial to the right to a fair trial.

15 THE COURT: Thank you. On the denial of right to fair
16 trial claims, can I ask why you believe that the focus should
17 be limited to the reports and not, for instance, potential
18 testimony provided by the officers or other information
19 presented to prosecutors? And similarly, can I ask why you
20 believe that the fact that the reports happened after the
21 arrest result in a denial of fair trial claim being unviable?

22 MS. CORCHIA: Because, your Honor, for example, with
23 regard to the report that was issued after charges were made,
24 it can't have been the source of the arrests or for the charges
25 being initiated because it was after the fact. So that's the

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1 explanation for that.

2 Also, your Honor --

3 THE COURT: I'm sorry, I'm sorry. Let me ask on that.
4 It's your view that a defendant cannot be guilty of a denial of
5 a right to fair trial claim if they provide false information
6 to the prosecution following the initiation of charges?

7 MS. CORCHIA: But they never provided this report to
8 the prosecution, your Honor. This was an internal report.

9 THE COURT: Thank you. Proceed.

10 MS. CORCHIA: Okay. There's also issues with the
11 failure to intercede cause of action, your Honor. If you are,
12 for example, the officer that is involved in excessive force,
13 for the sake of argument, you can't, at the same time, be held
14 for failure to intercede. It's one or the other.

15 Now, for example -- and plus, you also have to have
16 the ability to intercede. For example, on that instance,
17 Officer Catala becomes disabled almost right away after the
18 initial encounter with Mr. Bacote. And, again, I repeat, I do
19 acknowledge that there is an issue about the initial encounter,
20 but there's no issue that Mr. Catala, very early in the
21 interaction, winds up disabled, on the ground with a broken
22 leg.

23 So it is the claims, which I believe is Mr. Bacote's
24 testimony, he does claim Officer Catala placed his hands on him
25 and was an aggressor in the matter. So if we assume, arguendo,

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1 that's true, then Officer Catala cannot, at the same time, be
2 liable on a failure to intercede cause of action. And
3 certainly Officer Catala, who early on in the interaction is
4 now disabled on the ground, can't get up with a broken leg. He
5 is disabled.

6 So even if one says, well, he didn't intercede when
7 other officers were acting with excessive force, well, he was
8 physically unable at that point to intercede. Likewise --

9 THE COURT: I'm sorry, counsel, can I ask on that.
10 Was he rendered mute as a result of his injury?

11 MS. CORCHIA: I'm sorry, did you say "mute"?

12 THE COURT: Yes.

13 MS. CORCHIA: He was not, your Honor. He was on the
14 ground, and medical attention was being given by Officer
15 Mendoza, who had training, and which was going to bring up my
16 next point that she likewise cannot be liable for failure to
17 intercede since she, at that point, is concerned with tending
18 to Officer Catala, who is on the ground, in pain with a leg
19 broken in three places.

20 And, your Honor, on the excessive force issue,
21 interestingly, aside from the initial encounter, I will say,
22 Mr. Bacote is unable to identify specifically who did what, you
23 know, there was a punch, a kick, multiple punches, who did
24 what. He simply does not know. There's only one individual
25 that he does identify, only by a description, as having kicked

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1 him after he's handcuffed, but other than that -- and that
2 somewhat matches -- that description somewhat matches one of --
3 not exactly but somewhat matches one of the officers.

4 But other than that, there's no identification of the
5 one officer did one punch, you know, who punched, who kicked,
6 what was going on, and it's difficult. I would submit that you
7 would have to know what particular officer did what in order to
8 claim that that particular officer engaged in excessive force
9 because a simple -- a punch is not, in and of itself, excessive
10 force, your Honor.

11 Right. And, again, I reiterate that under the
12 circumstances, most of these officers are coming after Officer
13 Catala is already on the ground, and all they know is there's a
14 fight in progress. They receive a radio call. They come.
15 There's an officer on the ground.

16 And, your Honor, I'm going to point out two other of
17 the officers also were injured and had to be taken to the
18 hospital during this incident. So I believe we have a viable
19 motion on the excessive force claim.

20 At least, your Honor, for the officer that had come
21 after this initial incident, confrontation, whatever you want
22 to call it because, again, to be fair, we do acknowledge
23 there's a question of fact as to who did what initially.

24 Thank you, your Honor. That's a summary of our
25 anticipated motion.

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1 THE COURT: Thank you. Mr. Cohen, this is not oral
2 argument on the motion itself, but I'd like to give you the
3 opportunity to respond. First, I'd like to hear your response
4 with respect to the first two issues identified by defendants,
5 namely, their concerns regarding the viability of the false
6 arrest and malicious prosecution claims as they go to the
7 later-arriving officers. If those claims were dismissed, as I
8 understand it, we would have a trial with those issues with
9 respect to Officers Catala and Gregory.

10 MR. COHEN: Well, so the later-arriving officers that
11 I could identify are, I think it was Leath. I think everybody
12 else was pretty much there. I would consider maybe dropping
13 him, as well, for the false arrest potentially, but everybody
14 else was there for the whole -- the whole reason or the
15 probable cause they claim was the reason for approaching or the
16 reasonable suspicion for approaching my client, which is to say
17 that he had gotten -- they had information from a witness that
18 he had assaulted someone.

19 Now, that witness testified and said he never told the
20 officers that, and there's where we have an issue of fact. So
21 the whole very basis for all of these officers who were present
22 and heard this -- allegedly came up with this -- well, our view
23 is they came up with the story afterwards, that was their basis
24 for stopping and detaining my client.

25 And so they're all -- I think they're all liable

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1 equally for assisting in helping detain my client, if that is
2 their story, which I believe is a lie and a fabrication.

3 THE COURT: Thank you. Can I ask regarding an
4 apparent difference of opinion regarding the facts as you
5 assert them, compared with the description by counsel for
6 defendants. Why do you say that only Officer Leath was late
7 arriving, as opposed to --

8 MR. COHEN: The video shows all these other officers
9 were there. The video shows Officer -- the officers identified
10 that Codero was there, that Marsonico was the one holding the
11 video, Officer Mendoza was there. They all testified that they
12 were there when the initial interaction started.

13 THE COURT: I'm sorry, let me take a moment then to go
14 back to counsel for defendant. Counsel for defendants, are you
15 asserting that only Officers Catala and Gregory were there at
16 the initiation of the incident, or in other words, do you
17 dispute counsel's description of what is shown on the
18 videotape?

19 MR. RHODEN: Your Honor, Horace Rhoden, your Honor.
20 What we're saying at the initial contact with Mr. Bacote, only
21 two officers were present with the initial contact, and only
22 those two officers know why the contact was made -- well, the
23 two officers and Mr. Bacote know why the contact was made.

24 THE COURT: I'm sorry, counsel. Let me interrupt you
25 because what I was told earlier was that your view was that the

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1 other officers were there responding to a fight and that they
2 arrived on the scene and that they saw Officer Catala on the
3 ground with a broken leg. That is not entirely consistent with
4 your comments. Could you please explain to me defendants' view
5 of the facts?

6 MR. RHODEN: Your Honor, there was a struggle going on
7 some 75 to 80 feet away from where Mr. Bacote, the plaintiff,
8 was at the time, and this struggle caused for a call. The
9 officers made a call of a fight in progress. Now, once that
10 call was made, officers came on the scene, you know, at
11 different times.

12 THE COURT: Thank you. Let me ask again. My
13 understanding from the description of the proposed motion from
14 defendants' presentation earlier was that the basis for the
15 probable cause of the later-arriving officers was that they
16 were responding to the call regarding a fight, which I
17 understood to be a reference to the fight involving Mr. Bacote.

18 Otherwise, it's not apparent to me why another fight,
19 not involving Mr. Bacote, would form the basis of probable
20 cause to arrest Mr. Bacote. Could you please explain further?

21 MR. RHODEN: Yes, your Honor. The fight in progress
22 call was not the fight with Mr. Bacote. The fight in progress
23 call was something that was going on some 75 feet away from
24 where Mr. Bacote was, and that's the call that caused the
25 officers to come to the scene.

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1 Officer Gregory and Officer Catala was one of the
2 first officers that got to the scene, and once they got to the
3 scene, they were told information that the fight was caused by
4 Mr. Bacote, that the struggle involved Mr. Bacote, who was
5 standing some 80 feet away from where the struggle was going.

6 Officer Catala and Gregory then went over to
7 Mr. Bacote to question him regarding this fight. Now,
8 obviously, there's a dispute here as to what happened when
9 Officer Catala and Officer Gregory went to Mr. Bacote and
10 questioned him, but needless to say, that contact was made
11 between the two.

12 The officers said Mr. Bacote put his hands on them.
13 Mr. Bacote said it was the officers that put their hands on
14 him, but needless to say, contact was made and a struggle began
15 between Officer Gregory, Catala and Bacote. Within 30 seconds
16 of that struggle that began, Officer Catala and Mr. Bacote went
17 to the ground, and Officer Catala ended up with a broken leg.

18 THE COURT: Thank you. Can I ask regarding --
19 Mr. Rhoden, I'm sorry --

20 MR. RHODEN: He went to migrate over to where this was
21 going on, but only Officer Gregory and Officer Catala could say
22 what happened to cause hands being placed on each other,
23 whether it was they put their hands on the plaintiff,
24 Mr. Bacote, or whether Mr. Bacote initiated the contact, only
25 those three.

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1 But any other officers who came later on, once they
2 saw the tussling that was going on between two officers and a
3 civilian, then they certainly would have had probable cause at
4 that moment, and their probable cause would have been different
5 than Officers Gregory and Officer Catala had. Once the other
6 officers come and they saw the tussling going on, they would
7 have had probable cause to intervene, and that's what we mean,
8 your Honor.

9 MR. COHEN: Your Honor, may I clarify a little bit?
10 The video shows most of the officers -- I can't say all of them
11 for sure, I don't believe Leath or Ifill, actually now that I'm
12 thinking about it. I have to review the video again. But the
13 video shows all of the officers approaching before Catala even
14 gets to the ground. All of the officers are present before
15 Catala falls to the ground.

16 There's no call made over the radio for these
17 officers. The only officers that appear, that are defendants
18 in this case, that appear as a result of a call, from what I
19 gather from the evidence, are Ifill and Leath. And I have to
20 review the video to be sure of that, but I think that those are
21 the only two Officers that actually appear as a result of a
22 call.

23 All the other officers are already on the scene
24 dealing with this other incident, and as Mr. Rhoden says,
25 they're about 50 to 70 feet away. They are -- they claim the

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1 basis for approaching Mr. Bacote was because they were dealing
2 with this incident, and they all -- first, Gregory and Catala
3 start walking over, but then they all walk over and start to
4 deal with Mr. Bacote.

5 Even Officer Mendoza was standing literally two feet
6 away when they threw -- when Gregory threw Catala and Bacote to
7 the ground.

8 MR. RHODEN: Your Honor, we certainly would like to
9 make the motion to flush this out because I think the
10 undisputed evidence will show it was only Officer Gregory and
11 Officer Catala who made the initial contact with Mr. Bacote.

12 It was when the other officer -- they all testified
13 when they heard a ruckus, when they heard that Officer Gregory
14 and Officer Catala saying: Put your hands behind your back,
15 put your hands behind your back, that's when they started to,
16 one by one, walk towards, walk like 75 to 80 feet from where a
17 fight was -- what was called a fight in progress was going on,
18 to go over to Mr. Bacote. But the initial contact, the initial
19 touching was done only with Officer Gregory and Officer Catala.

20 THE COURT: Thank you. Thank you. Thank you. I look
21 forward to seeing the evidence on this. I will see sworn
22 testimony, presumably. Presumably, I will see some version of
23 recounting of the version of the facts suggested by Mr. Cohen,
24 as well.

25 There appears to be dispute regarding where the

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1 officers were at the time of the incident. Mr. Rhoden asserts
2 that they were 50-plus feet away at the time of the incident.
3 Mr. Cohen states that the videotape shows that they were in
4 much closer proximity at the time of the initiation of what
5 counsel described as the fracas and those are facts. If it's a
6 disputed fact, I will be able to evaluate it.

7 In any event, I will see sworn affidavits and other
8 testimony assuming to each of the respective versions of fact,
9 and I will have the opportunity to assess whether there's a
10 disputed fact on the basis of that information. It's not
11 apparent to me that there's not a disputed issue of fact on
12 this issue, on the basis of the colloquy that we've had here,
13 but I can't make that determination at this time.

14 So let's talk about the denial of the right to fair
15 trial claim. Before we move on to that, Mr. Cohen, I'd
16 appreciate it if you would consider whether there is a viable
17 claim with respect to the false arrest and malicious
18 prosecution as to Defendant Leath. That is an issue that I
19 leave to you, but to the extent that the parties can continue
20 to narrow the issues that will be subject to the motion in
21 anticipation of trial, it will be appreciated.

22 MR. COHEN: Absolutely, your Honor. I will definitely
23 continue to see if I can narrow those issues.

24 With respect to the denial of fair trial, I think this
25 is possibly one of the strongest claims. The criminal

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1 complaint says that my client picked up -- you know, grabbed
2 Mr. Catala, Officer Catala, by the upper body and threw him to
3 the ground. The video is -- completely shows something
4 different, but aside from that, the officers now have changed
5 their story.

6 One officer says that, no, he actually swung his arm
7 and he made him fall to the ground. Another officer said he
8 did this leg lock, which apparently the defendants are now
9 adopting as their theory. There's no appearance of a leg lock
10 in this video. My client denies that there's any of this.

11 I mean, it's a pretty big fabrication here because it
12 was snowing, it was slippery outside. They all admit it was
13 slippery outside. The idea that my client actually physically
14 threw or kicked or pushed Officer Catala is just -- is a big
15 fabrication. I think that's a material fabrication.

16 The officers all testified to telling prosecutors that
17 they believed my client intentionally pushed Catala to the
18 ground or leg locked him to the ground or did all those things.
19 When you look at the video, it's very clear to me, at least
20 from my interpretation of the video -- and, again, that's why
21 we need a fact finder -- that Gregory, in tussling with my
22 client and Catala, threw both of them to the ground. And you
23 see both of them fall to the ground at the same time.

24 The other major fabrication is Louis Codero was in
25 charge of preparing the arrest reports. Now, they do this

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1 through the Omniform system in the NYPD, and because they don't
2 have their own IDs, they have to use -- you know, user names
3 and passwords to do the Omniform system, they use the officers
4 from their local precinct, I think it was the 45th, who entered
5 in a narrative.

6 And in that narrative, it says my client, as soon as
7 he was approached by officers, started swinging, punching and
8 kicking the officers. I showed the police report to all of the
9 officers that were present, and I asked them if they saw my
10 client doing that, and they said, no. And in fact, one officer
11 says that's a total fabrication.

12 Now, Mr. Rhoden and defendants are playing a game and
13 saying, well, he didn't actually prepare that report, the NYPD
14 prepared the report. When I asked the Officer Codero if he
15 prepared the report, he said -- he said he doesn't remember,
16 but more importantly than that, I said: Did you actually
17 printout the report? He said yes. And did you bring it to the
18 district attorney's office? He said: Yes. I said: Did you
19 read it before you brought it to the district attorney's
20 office? He said: Yes. And did you make sure it was accurate?
21 He said: Yes.

22 So whether he prepared the report or didn't prepare
23 the report, he forwarded this fabricated evidence, which all
24 the officers agreed did not occur, to the district attorney's
25 office. And I think it's also, you know, it's also another big

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1 fabrication here that I think makes this probably the strongest
2 claim, if not -- that we have.

3 THE COURT: Thank you. Counsel, can I pause you on
4 that because as I understand it, there's one report that was
5 forwarded to the prosecutor's office. Counsel for defendant
6 pointed to three separate reports. What's your view regarding
7 the significance of the reports, other than the initial report
8 that you just described?

9 MR. COHEN: Well, it doesn't matter if they're written
10 or they're oral. The information -- it's really the
11 information that's transmitted to the DA's office, and we also
12 have the -- we've got the DA summary from the district
13 attorney's office, and we're still waiting for the whole
14 district attorney file.

15 And the information is clearly -- it contradicts what
16 my client says, and it contradicts what some of the other
17 officers say. So I don't I think there's a -- you know, the
18 reports are just evidence of what information was ultimately
19 transmitted to the DA's office.

20 There's another what appears to be an internal Co-Op
21 City report, and I'm not sure if it was transmitted to the DA's
22 office or not because the officer said he doesn't know if he
23 turned it over. It doesn't matter whether the actual physical
24 document was turned over, as long as the information was turned
25 over. And I think that this is evidence that this information,

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1 if it's in fact fabricated, would be the basis for the claim.

2 THE COURT: Thank you. Can you remind me who the
3 individual defendants are who are, I'll call it, the subject of
4 your pretrial claim?

5 MR. COHEN: Sure. So Sergeant Gregory, who testified
6 in the grand jury and who also testified that he spoke to the
7 district attorney's office and went there several times during
8 the course of the pendency of the case.

9 Same with Officer Catala did the same thing. They
10 all, you know, alleged to the district attorney's office that
11 my client threw him or knocked him to the -- knocked Officer
12 Catala to the floor.

13 There is also Codero. He is the one who was the
14 arresting officer, who was actually present for a lot of the
15 incident and submitted wildly changing stories in his report
16 and in his communication with the district attorney's office.

17 There's Officer Marsonico, who testified in the grand
18 jury, and Officer Mendoza, who also testified in the grand
19 jury.

20 We -- speaking of which, we got a decision from the
21 State court judge on the grand jury minutes. She denied my
22 application. I submitted a proposed letter that I'd like to
23 submit to your Honor as my basis for reviewing that decision,
24 and I'm waiting for Mr. Rhoden to give me his portion. He said
25 he'll have it by the end of the week.

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1 THE COURT: Thank you. I'm happy to review your
2 letter. It's not apparent to me what authority I have to
3 review a decision by a State court judge.

4 MR. COHEN: I have cases that cite that you are
5 absolutely authorized to review such a decision.

6 THE COURT: Thank you. I will happily review those.

7 MR. COHEN: Okay.

8 THE COURT: Why would grand jury testimony, in and of
9 itself, be a basis for any claim against these officers?

10 MR. COHEN: They wouldn't be, actually, your Honor.

11 THE COURT: I know. Counsel, that's why I asked the
12 question. I know.

13 MR. COHEN: They explicitly are not the basis for a
14 claim. What they are are circumstantial evidence of what was
15 told to the district attorney's office and what was told to the
16 district attorney. You know, it's consistent with what
17 information -- it would also be impeachment for how their story
18 has changed from when they stated it close in time to when the
19 incident occurred and to now and at the various time frames in
20 this case.

21 THE COURT: Thank you. Continue.

22 Failure to intercede.

23 MR. COHEN: Failure to intercede. Okay. So there are
24 two aspects of the failure to intercede, your Honor. One is
25 the classical aspect, which is, they did not get involved when

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1 they -- when there was a fight -- when they were using
2 excessive force, but there was also another failure to
3 intercede when other officers observed the violation of
4 constitutional rights, like fabricating evidence and the like.

5 You know, with respect to failure to intercede, one of
6 the -- Officer Leath, who was the subject of a prior
7 discussion, testified -- told me over the phone, in the
8 recorded conversation I had with him, which may or may not be
9 admissible in court, we'll find out -- told me that they
10 were -- that all the officers were trying to assault him and
11 were not interested in putting the handcuffs on him, and he
12 stepped in to put the handcuffs on because the other officers
13 were assaulting him.

14 THE COURT: Thank you.

15 MR. COHEN: So, I mean, to me, I think it's very
16 clearcut that there was a lot of officers there that were not
17 getting involved -- were not interested -- were really
18 attacking him and not interested in handcuffing him.

19 There was also an incident at the van, where my client
20 said he was being assaulted while in handcuffs, and there were
21 other officers present that didn't stop it. And I believe even
22 Officer Catala could be in violation -- you could have a claim
23 of failure to intercede because during the incident, he didn't
24 tell them to stop or anything of that nature. And during the
25 prosecution, during the case, he didn't tell the district

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1 attorney or anybody else that the other officers were
2 fabricating evidence, and same with Mendoza.

3 THE COURT: Thank you. Good. Can I ask you to
4 respond to the proposed motion with respect to the excessive
5 force claims?

6 MR. COHEN: Well, your Honor, I think the video has --
7 first of all, a lot of the officers admitted what kind of force
8 they employed. One officer admitted that he used his baton.
9 Another officer admitted that he sprayed OC spray in my
10 client's eyes. Another officer -- the video shows one officer
11 very explicitly, and this is a highly disputed fact, but it
12 shows an officer, after they've already put handcuffs on my
13 client, and everybody acknowledged the handcuffs were on, you
14 see him stepping into the center of the pile, where my client
15 is, which corresponds pretty closely with the injuries of a big
16 gash on his head.

17 So I don't believe that it can't be parsed out. I
18 believe a fact finder can determine, using the video evidence,
19 using the officer's testimony, who is responsible for what
20 injuries and, you know, who is responsible for excessive force.
21 So I disagree with the claim that just because my client can't
22 identify who threw what punch, that that makes any difference.

23 THE COURT: Thank you. Good. So let's talk about the
24 schedule for this proposed motion.

25 Counsel for defendants, when would you propose to file

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1 the motion?

2 MS. CORCHIA: Your Honor, I thought we earlier had had
3 a February 20th date.

4 THE COURT: Thank you. Is that still your proposal,
5 or can you do it sooner?

6 MS. CORCHIA: I think we would like to keep to that
7 date, your Honor.

8 THE COURT: Thank you. I ask in large part because we
9 know now, at this point, that we will be going to trial in this
10 matter with respect to certain claims in any event; so I'd like
11 to keep the case moving at a pace so that we can move to trial
12 promptly.

13 Counsel for plaintiff, what's your view?

14 MR. COHEN: Of response time, opposition?

15 THE COURT: No, first, the initiation date for the
16 motion practice?

17 MR. COHEN: That's fine. February 20th is fine.
18 Whatever is acceptable to the Court, your Honor.

19 THE COURT: Thank you. Good. I will adopt that
20 proposal.

21 Counsel for plaintiff, how much time would you propose
22 to prepare your opposition?

23 MR. COHEN: Can I have the same amount of time that
24 they have for moving, which is -- it looks like it's a little
25 bit more, like a month and a half?

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1 THE COURT: No. I'm willing to give you up to a
2 month, but I prefer three weeks.

3 MR. COHEN: Can I have a month, please?

4 THE COURT: Thank you.

5 Counsel for defendants, what's your view?

6 MS. CORCHIA: We have no objection, your Honor.

7 THE COURT: Thank you. Good. Then the schedule for
8 the motion follows. The motion for summary judgment is due no
9 later than February 20th. Any opposition will be due no later
10 than one month following service of the motion. Any reply will
11 be due two weeks following service of the opposition.

12 Let me take a moment just to direct each of you to the
13 SDNY's rules regarding 56.1 statements and, in particular,
14 opposition and replies to 56.1 statements. First, as you know,
15 the rules generally require that you point to record evidence
16 in support of any contested piece of what you claim to be
17 undisputed material fact.

18 The local rules and my individual rules require that a
19 party that is presenting a 56.1 response basically cut and
20 paste out all of the 56.1 statements, and then respond
21 immediately below the statement by the opposing party.

22 I remind you that a 56.1 statement is not an answer to
23 a complaint; so you cannot simply say "denied" or "disagree."
24 There is a disputed issue of material fact. Rather, you must
25 point to the record evidence that supports that position.

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1 Failure to do so can be deemed an admission of the disputed
2 fact, even if you say "I disagree" or "this point is disputed."
3 You must point to record evidence establishing that.

4 I'll remind everybody that these motions, like all
5 others, are certified by counsel; so you are certifying, as
6 counsel, that there are disputed issues of material fact.

7 And in connection with the motions, as with everything
8 in the submissions that you're making to me, you must present
9 proper evidence supported by sworn affidavits in connection
10 with any documents that are to be considered by the Court in
11 connection with the motion, including deposition transcripts.

12 I think that's all that I'll point you to. You should
13 also be aware that I request two courtesy copies of all of the
14 materials in connection with the motions which are to be
15 compiled by the moving party. Those materials should include
16 the motions, the memorandum of law in support of the motions,
17 the affidavits and any evidentiary support that's presented in
18 connection with the motions.

19 So I look forward to seeing all of that, and I will
20 try to focus on these motions a little earlier on my list,
21 given that I understand we will be going to trial with respect
22 to a number of these claims. I'd like to be able to move to
23 that promptly with respect to any claims that survive the
24 motion to dismiss and with respect to the false arrest and the
25 malicious prosecution, at least, as against defendants Catala

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1 and Gregory, as to whom I understand that no motion is being
2 made.

3 All right. Is there anything else that we should
4 discuss in this conference, counsel for plaintiff?

5 MR. COHEN: No, your Honor.

6 THE COURT: Good. Thank you.

7 Counsel for defendants?

8 MR. RHODEN: No, your Honor.

9 THE COURT: Good. Thank you, all.

10 (Adjourned)
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